FILED

No. 98-315 AUG 21 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN RE-INSURANCE COMPANY
and NAC REINSURANCE CORPORATION,

Petitioners,

—v.—

JOHN P. CRAWFORD, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, AS RECEIVER OF EMPLOYERS NATIONAL INSURANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED

I. Whether the Federal Arbitration Act is reverse preempted by state laws (a) granting state courts exclusive jurisdiction over delinquency proceedings against insurance companies and (b) allowing state courts to enjoin *in personam* actions in federal court.

II. Whether the McCarran-Ferguson Act empowers state courts to enjoin *in personam* federal court actions against insurance companies.

PARTIES TO THE PROCEEDING BELOW

The appellants in the Fifth Circuit, who are petitioners here, were Munich American Reinsurance Company and NAC Reinsurance Corporation. Munich American Reinsurance Company has been merged into American Re-Insurance Company. The appellee in the Fifth Circuit, who is the respondent here, was John P. Crawford, Insurance Commissioner of the State of Oklahoma, as Receiver of Employers National Insurance Corporation.

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS

1. American Re-Insurance Company (Munich American Reinsurance Company, an appellant in the Fifth Circuit was merged into American Re-Insurance Company):

   Parent Companies:
   Munich Reinsurance Company of Munich, Germany
   American Re Corporation

   Nonwholly Owned Subsidiary Companies:
   None

2. NAC Reinsurance Corporation:

   Parent Company:
   NAC Re Corporation

   Nonwholly Owned Subsidiary Companies:
   None

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Best's Insurance Reports, Property-Casualty United States, Vol. II:K-Z (1997) 23

John H. Binning & Timothy L. Moll, *Arbitration of Reinsurance Disputes in Liquidation of Insurance Companies*, 32 Tort & Ins. L.J. 937 (1997) 9, 24

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IN THE
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AMERICAN RE-INSURANCE COMPANY
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JOHN P. CRAWFORD, INSURANCE COMMISSIONER
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EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, issued and entered in this case on June 2, 1998.

OPINIONS BELOW

The Fifth Circuit's opinion (Appendix A)[1] is reported at 141 F.3d 585. The unpublished judgment and order of the district court entered on February 28, 1997, dismissing the petition to compel arbitration under the *Burford* abstention doctrine, are reproduced in Appendix B. The district court's unpublished orders of November 14, 1996, October 9, 1996, and September 18, 1996, are reproduced at Appendix C, D, and E, respectively.

JURISDICTION

The Fifth Circuit's judgment was entered June 2, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are: the U.S. Const. Art. III, § 2, cl. 1 and Art. VI, cl. 2 (Appendix F), the pertinent provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (Appendix G), the pertinent provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (Appendix H), 28 U.S.C. § 1332(a) (Appendix I), and the pertinent provisions of the Oklahoma Uniform Insurers Liquidation Act, Okla. Stat. tit. 36 §§ 1901-1921 (Appendix J).

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[1] References to "App. __a" are to the Appendix.

STATEMENT OF THE CASE

The central issue in this case is whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, (the "FAA") is reverse preempted by state laws giving state courts exclusive jurisdiction over delinquency proceedings against insurance companies. A related issue is whether the McCarran-Ferguson Act gives States the power to enjoin *in personam* actions in federal court against insurance companies. Because of the widespread use of arbitration in the insurance and reinsurance community, these are issues of national and international concern.

A. Proceedings in the Federal District Court

In 1986, Petitioners American Re-Insurance Company[2] and NAC Reinsurance Corporation entered into reinsurance contracts with Employers National Insurance Company ("ENIC"). (App. 2a-3a.) In 1994, Oklahoma placed ENIC in liquidation and appointed the Oklahoma Insurance Commissioner, Respondent John P. Crawford, as Receiver. (App. 3a.) Respondent refused to honor ENIC's written agreement to arbitrate contractual disputes in Texas. (App. 45a-46a.)

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[2] Munich American Reinsurance Company, an appellant in the Fifth Circuit, has been merged into American Re-Insurance Company.

Consequently, Petitioners filed a petition under Section 4 of the FAA and 28 U.S.C. Section 1332(a), in the United States District Court for the Northern District of Texas, to enforce the parties' written agreements to arbitrate. (App. 45a.) Respondent submitted to the jurisdiction of the district court, defended the petition on its merits, and lost. (App. 38a-39a, 48a.) The district court found that ENIC was a party to the reinsurance contracts and had agreed to arbitrate disputes arising under the contracts. (*See* App. 47a.) Accordingly, the court ordered the parties to arbitrate in accordance with the terms of the reinsurance agreements. (App. 48a.)

Respondent moved for reconsideration on the merits. (App. 38a.) Alternatively, he asserted -- for the first time -- that an injunction in the state court order placing ENIC into liquidation (the "liquidation order") barred Petitioners' initial filing of their petition in the district court. (*See* App. 38a.)

The district court denied Respondent's motion in its entirety. (*See* App. 42a-43a.) Having found that the parties agreed to arbitrate, the court concluded "its role in this litigation [had] terminated." It also observed that the state court was the court that should interpret and enforce the liquidation order injunction. (App. 42a.) Respondent then moved the state court to enjoin the arbitration and to hold Petitioners in contempt for initially filing their petition in the district court. (*See* App. 33a.) The state court did not grant this relief. Petitioners then moved the district court for an injunction to enforce its arbitration order. In response, the district court "clarified" its order, stating that Respondent should move to dismiss the federal petition if the state court held that Petitioners violated the injunction in the liquidation order. (App. 34a.) After Respondent advised the

state court of the district court's "clarification," the state court held that Petitioners violated the liquidation order by filing a federal petition. (App. 30a.)

Thereafter, the district court granted Respondent's motion to dismiss, vacated its order compelling arbitration, and dismissed the petition under the *Burford* abstention doctrine, without prejudice to refiling in the state court. (App. 28a, 30a-31a.)

B. The Fifth Circuit's Decision on Appeal

On appeal, the Fifth Circuit held that under this Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), the district court erred in dismissing the federal petition under *Burford*, because the district court had no discretion to deny the relief Petitioners sought. (App. 10a-11a.) The Fifth Circuit acknowledged that States cannot divest federal courts of diversity jurisdiction. (App. 25a.) It also agreed that the dispute Petitioners sought to arbitrate was "committed to arbitration under the reinsurance agreements." (App. 21a-22a.) Nonetheless, the Fifth Circuit held that the FAA was reverse preempted by Oklahoma law under the McCarran-Ferguson Act. (App. 25a-26a.)

The Fifth Circuit reasoned that, viewed in its entirety, Oklahoma's Uniform Insurers Liquidation Act (the "OUILA") regulates the business of insurance because liquidating insolvent insurance companies in an organized manner is crucial to the relationship between insurance companies and policyholders. (App. 16a.) The court conceded that its reasoning that the entire OUILA regulates the "business of insurance" might be inconsistent with this Court's decision in

United States Department of Treasury v. Fabe, 508 U.S. 491 (1993), but concluded that "*Fabe*'s holding in this respect is simply unclear." (App. 17a.)

The Fifth Circuit held that, in any event, two provisions of the OUILA regulate the "business of insurance": Section 1902, which declares that the Oklahoma County District Court (the "state court") has "exclusive jurisdiction" over "delinquency proceedings" (the "jurisdictional statute"); and Section 1904, which grants the state court the power to issue injunctions in connection with insurer delinquency proceedings (the "injunction statute"). (App. 18a.)

Neither statute refers to or is limited to policyholder-creditors. *See* Okla. Stat. tit. 36 §§ 1902, 1904 (LEXIS through 1997 First Sess.). The Fifth Circuit conceded that these statutes do not solely benefit policyholders and that any benefit to policyholders is indirect. (App. 20a-21a.) Further, because Oklahoma laws do not divest the federal courts of diversity jurisdiction (App. 25a) the Fifth Circuit necessarily conceded that the state court's jurisdiction over the dispute was not "exclusive."

The Fifth Circuit believed, however, that consolidation of all actions in a single court, "enforced through injunctions, [benefits policyholders by conserving] the insurance company's assets for ultimate payment to policyholders as well as other creditors." (App. 19a.) Accordingly, the court held that the jurisdictional and injunction statutes regulate the business of insurance because they were "reasonably necessary to further the goal of protecting policyholders." (App. 20a.)

Neither the jurisdictional or injunction statutes nor the liquidation order expressly bars arbitration. Nevertheless, the Fifth Circuit determined that:

> Regardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the [state] court nevertheless conflicts with the Oklahoma law giving the state court the power to enjoin any action interfering with the delinquency proceedings.

(App. 23a.) Moreover, the court of appeals held that, although state courts "generally" cannot enjoin *in personam* federal actions, Congress bestowed broad power on the States under the McCarran-Ferguson Act to enjoin federal proceedings when the state is acting under a law that regulates the business of insurance. (App. 24a-25a.) Because the liquidation order contained an injunctive provision, the Fifth Circuit held that the statute was "sufficient[ly]" impaired by the FAA so as to "trigger the McCarran-Ferguson Act." (App. 24a.)

The Fifth Circuit made clear that it was *not* holding that Petitioners have no right to arbitrate; only that the federal court had no power to compel arbitration. (App. 22a & n. 5; App. 26a.) Thus, the court affirmed the district court's dismissal without prejudice to refiling the "petition [in] the Oklahoma state court for an order compelling arbitration of their dispute." (App. 26a.)

The court acknowledged that in *Bennett v. Liberty National Fire Insurance Co.*, 968 F.2d 969 (9th Cir. 1992), "a case very similar to the instant case, the Ninth Circuit rejected [the] argument that state insurance insolvency laws were impaired by

having the dispute arbitrated under the FAA." (App. 22a-23a n.6.) The Fifth Circuit, however, expressly declined to follow *Bennett*. (*Id.*)

For the reasons that follow, this Court's review of the Fifth Circuit's decision is warranted.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holdings that procedural provisions of state insurer liquidation acts reverse preempt the FAA under the McCarran-Ferguson Act and that the McCarran-Ferguson Act allows state courts to enjoin federal actions, and the similar holding of the Second Circuit, directly conflict with decisions in the First, Third, Eighth, and Ninth Circuits. As a result, a party that seeks to enforce its contractual rights by moving a federal court to compel the liquidator of an insolvent insurance company to arbitrate will face different outcomes in different circuits. The motion would succeed in the First, Third, Eighth, and Ninth Circuits but would now fail in the Second and Fifth Circuits.

The Fifth Circuit's decision undermines the strong federal policy favoring arbitration, reflected in the FAA and acknowledged by this Court, by eviscerating the federal right to enforce agreements to arbitrate if one party becomes insolvent. The insurance and reinsurance industry is a national and international industry that relies heavily on arbitration before industry professionals to resolve complex industry disputes. *See* Richards D. Barger & Dennis C. Quinn, *Foreign reinsurers' ability to arbitrate disputes with the liquidators of*

insolvent insurers, 4 Int'l J. Ins. L. 235, 235 (Oct. 1995). The Fifth Circuit's decision also allows state courts to oust federal courts of their diversity jurisdiction in actions against insurance companies. Finally, the Fifth Circuit's misapplication of this Court's decisions in *Fabe* and other McCarran-Ferguson Act cases will lead to confusion and misunderstanding in the law in determining whether procedural provisions of state insurer liquidation laws are "impaired" by federal laws and whether laws regarding the procedures for adjudicating disputes are laws regulating the "business of insurance."

The issues in this case are certain to recur time and again. Virtually every State has an insurer liquidation act similar to the OUILA. Consequently, in recent years one of the most widely litigated issues relating to reinsurance has been whether the liquidator of an insolvent insurance company can be compelled under the FAA to arbitrate disputes arising out of the reinsurance contract. *See* Robert M. Hall, Comment, *Recent Case Developments on Arbitration in US Receiverships*, 1 Int'l J. Ins. L. 51, 51 (Jan. 1998); John H. Binning & Timothy L. Moll, *Arbitration of Reinsurance Disputes in Liquidation of Insurance Companies*, 32 Tort & Ins. L.J. 937 (1997); Barger & Quinn, *supra*, at 235.

I. THE FIFTH CIRCUIT'S DECISION THAT THE FAA IS REVERSE PREEMPTED BY THE OKLAHOMA INSURER LIQUIDATION LAWS, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT

A. The Fifth Circuit's Decision Conflicts With Decisions of Other Circuits

A state law cannot reverse preempt a federal law under the McCarran-Ferguson Act unless the federal law invalidates, impairs, or supersedes the state law and the state law is enacted to regulate the "business of insurance." 15 U.S.C.A § 1012(b) (West 1997). The Oklahoma jurisdictional and injunction statutes at issue in this case are procedural; they do not bear on ENIC's substantive rights or obligations under the reinsurance agreements. *See* Okla. Stat. tit. 36 §§ 1902, 1904. The Fifth Circuit's conclusion that the FAA is reverse preempted by these statutes conflicts with decisions of the Ninth,[3] Third,[4] Eighth,[5] and First[6] Circuit Courts of Appeal. Indeed, the Ninth and

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[3] *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992).

[4] *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953 (3d Cir. 1993).

[5] *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996), *cert. denied*, 138 L. Ed. 2d 210, 117 S.Ct. 2452 (1997).

[6] *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993); (continued...)

Third Circuits specifically concluded that arbitration under the FAA would not interfere with insurer delinquency proceedings, and the FAA applied irrespective of state insurer liquidation laws and the McCarran-Ferguson Act.[7]

The Fifth Circuit admitted that its decision conflicts with the Ninth Circuit's decision in *Bennett* on facts that were very similar to this case. (App. 22a-23a n.6.) In *Bennett*, a reinsurer removed a Montana liquidator's action to federal court, then moved under the FAA to compel the liquidator to arbitrate. *Bennett*, 968 F.2d at 970. Like Oklahoma, Montana's insurer liquidation act is comprehensive and purports to be "exclusive." *See id.* at 972; Mont. Code Ann. §§ 33-2-1301-1311, 1305 (LEXIS through 1997 Sess.). Also like the OUILA, the liquidator can obtain injunctions under the Montana act to prevent interference with the delinquency proceedings. *Id.* § 1309.

As here, *Bennett* involved the enforcement under the FAA of the reinsurer's contractual right to arbitrate. *Bennett*, 968

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[6] (...continued)
Garcia v. Island Program Designer, Inc., 4 F.3d 57 (1st Cir. 1993).

[7] In *Stephens v. American International Insurance Co.*, the Second Circuit held that the entire Kentucky liquidation scheme in general, and a liquidation statute that expressly precluded arbitration in particular, reverse preempted the FAA under the McCarran-Ferguson Act. *Stephens*, 66 F.3d 41 (2d Cir. 1995). The OUILA does not refer anywhere to arbitration. Moreover, for the same reasons that the Fifth Circuit's decision here was wrong, *see infra* at 17-26, *Stephens* was also incorrectly decided.

F.2d at 971-72. The Ninth Circuit held that compelling arbitration under the FAA would not impair orderly liquidation or interfere with the state insurer insolvency laws and the state insurer insolvency laws did not reverse preempt the FAA. *Id.* at 972-73[8]; *see also Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52, 56-57 (W.D. Mo. 1985) (FAA does not conflict with insurer insolvency act).

Although it recognized the conflict, the Fifth Circuit expressly declined to follow *Bennett*, suggesting that the Ninth Circuit misapplied the rule of comity under which courts will decline to exercise *in rem* or *quasi in rem* jurisdiction if another court has already assumed jurisdiction over the property. (App. at 22a-23a n.6.) The Fifth Circuit is plainly incorrect in that regard. As the court of appeals recognized when it held *Burford* inapplicable, a petition to compel arbitration is an *in personam* proceeding. Petitioners' federal action involved a single issue: whether ENIC is a party to the reinsurance contracts that give Petitioners the right to arbitration. (App. 42a.) The district court did not need control of property to adjudicate this issue. (*See* App. 46a-48a.)[9] At any rate, the Fifth Circuit's suggestion

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[8] The Ninth Circuit reaffirmed *Bennett* in *Quackenbush v. Allstate Insurance Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997).

[9] The underlying dispute to be arbitrated is also a simple contract dispute, to be determined under Texas law (*see* App. 41a-42a). The arbitrators do not need possession of property held by the liquidator to interpret the contracts under Texas law and rule on the parties' contractual rights and obligations. Rather, the "[determination of the existence and amount of the indebtedness], which is spoken of

(continued...)

that the Ninth Circuit misapplied the rule by which courts in *in rem* and *quasi in rem* actions defer to the first court assuming jurisdiction, was not integral to the Fifth Circuit's decision. In the end, the Fifth Circuit held that the FAA is reverse preempted by the jurisdictional and injunction statutes "regardless of the nature of the dispute." (App. 23a.)

The Fifth Circuit's decision also conflicts with the Third Circuit's reasoning in *Grode*. In *Grode*, the reinsurers sought to enforce their federal rights to arbitrate after they removed an insurance liquidator's action to federal court. *Grode*, 8 F.3d at 955. Like *Bennett* and this case, Pennsylvania's insurer insolvency act is comprehensive. *See id.*; Pa. Stat. tit. 40 §§ 221.23-221.52 (LEXIS through 1997 Sess.). Although *Grode* was an abstention case, the liquidator there argued that the McCarran-Ferguson Act supported its position that the dispute could not be arbitrated. Contrary to the Fifth Circuit's conclusion here, the Third Circuit rejected the liquidator's argument, holding that the McCarran-Ferguson Act was "totally irrelevant." *Grode*, 8 F.3d at 960. The Third Circuit also held that the mere exercise of federal jurisdiction over "an ordinary contract action in which the plaintiff happens to be an insolvent insurance company" would not interfere with the delinquency proceedings. *Id.* at 961. Finally, the Third Circuit held that "the state's interest in regulating insurance companies does not

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[9] (...continued)
as the liquidation of a claim, is strictly a proceeding in personam." *Riehle v. Margolies*, 279 U.S. 218, 223-24 (1929).

stretch to this situation because there is not a large number of similarly situated plaintiffs racing to the courthouse." *Id.*[10]

As in *Grode*, resolution of the contractual dispute in arbitration will not interfere with the delinquency proceedings. In *Grode*, the court recognized that policyholders have an interest in a uniform interpretation of the standard form policies issued by insurance companies. *Id.* at 960. But unlike the form policies insurance companies issue to policyholders, reinsurance contracts are negotiated agreements between sophisticated business parties. Further, this case is not a coverage dispute and it does not involve policyholders. Rather, this case involves the interpretation of contracts solely between Petitioners and ENIC. (App. 46a-47a.) The dispute is unique to the terms of the parties' contracts. Federal court enforcement of the arbitration agreements will not lead to rulings that conflict with the interpretation of policies ENIC issued to policyholders, piecemeal litigation of policyholder claims, or unequal treatment of policyholder claims. Rather, Petitioners and other similarly situated parties will be disadvantaged if arbitration clauses in otherwise enforceable contracts involving interstate commerce are dishonored by some circuits and not others.

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[10] Although the action in *Grode*, like *Bennett*, was removed to federal court, removal is only proper if an action could have been initiated in federal court. *See* 28 U.S.C.A. § 1441(a) (West 1994). Thus, there is no meaningful distinction in this case simply because Petitioners' motion to compel was initiated in federal court. In either case, a court other than the state court orders arbitration and the underlying dispute is resolved outside the state court.

Similarly, the Fifth Circuit's conclusion that delinquency proceedings would be impaired if *in personam* disputes are resolved outside the liquidation court (App. 23a) also conflicts with the Eighth Circuit's contrary conclusion in *Murff*. In *Murff*, the plaintiff brought a federal court action under the Age Discrimination in Employment Act ("ADEA") against an insurance company in rehabilitation under Missouri's insurer insolvency act. *Murff*, 97 F.3d at 290. After Murff filed the federal action, the rehabilitation was converted to a liquidation. *See id.* Like the OUILA, "delinquency proceedings" under the Missouri insolvency act are the sole means of liquidating insurers and the liquidator can obtain injunctions to prevent interference with the liquidation. Mo. Rev. Stat. §§ 375.1154-55 (LEXIS through 1997 Sess.). The district court dismissed Murff's federal action, finding that the McCarran-Ferguson Act precluded the federal court from "exercising jurisdiction because 'the independent exercise of [federal] jurisdiction . . . would impair [the insurer insolvency act].'" *Murff*, 97 F.3d at 290.

The Eighth Circuit reversed. *Id.* In contrast to the Fifth Circuit, the Eighth Circuit held that the exercise of federal jurisdiction over a federal claim would not so impair the liquidation that it would run afoul of the McCarran-Ferguson Act. *Id.* at 292.

The Fifth Circuit's decision also conflicts with the First Circuit's decision in *Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993). Unlike the Fifth Circuit, the First Circuit held that allowing an action against an insolvent insurance company to proceed in federal court would not impair Puerto Rico's version

of the UILA[11] because the UILA provisions were purely procedural and did not "absolve the insurer of any substantive liability." *Id.* at 882.

The Fifth Circuit's holding that the OUILA's jurisdictional and injunction statutes -- procedural statutes that do not differentiate between actions involving policyholders and those involving nonpolicyholders -- regulate the business of insurance, also conflicts with the First Circuit's decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993) (Breyer, J.). In *Garcia*, a federal priority statute that gave the government first priority in bankruptcy conflicted with a Puerto Rico insurer liquidation statute that barred claimants who filed late proofs of claim from sharing in the distribution of the estate unless all other claims had been paid. *Id.* at 58, 61. The insurer liquidation statute did not directly benefit policyholders. Rather:

> [I]t help[ed] policyholders only to the extent that (and in the same way as) it help[ed] all creditors. That is to say . . . the Commonwealth provision may bring about more speedy, orderly liquidation proceedings, thereby (perhaps) reducing the risks (and costs) of extending credit to the company.

Id. at 62. Although the liquidation statute in *Garcia* made the liquidator's job easier and relieved him of the burden of searching for recorded liens, then-Judge Breyer, writing for a

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[11] P.R. Laws Ann. tit. 26 §§ 4000-54 (LEXIS through 1992 Sess.).

unanimous panel, concluded that the statute provided policyholders with only an indirect, speculative benefit that was far too tenuous to prevent federal preemption. *Id.*; *see also Costle v. Fremont Indem.*, 839 F. Supp. 265, 274 (D. Vt. 1993) (insurer liquidation statute establishing procedures for collecting reinsurance proceeds not enacted to regulate the business of insurance).

Like the state statute at issue in *Garcia*, the jurisdictional and injunction statutes at issue here are, on their face, neutral as to the benefit (if any) provided to creditors that were policyholders as compared to the benefit (if any) provided to other creditors of an insolvent insurer. *See* Okla. Stat. tit. 36 §§ 1902, 1904. Neither provision even mentions policyholders, *see id.* §§ 1902, 1904. The Fifth Circuit conceded that creditors other than policyholders may also benefit from consolidation of claims in one court. (App. 19a-20a.) Moreover, the "benefit" provided to policyholders by requiring that all actions to establish ENIC's indebtedness must be brought in Oklahoma is purely speculative. Thus, to paraphrase the First Circuit in *Garcia*, while the jurisdictional and injunction statutes *might* make liquidation proceedings more orderly, thereby (*perhaps*) reducing the costs, liquidation would still be manageable without such provisions. *See Garcia*, 4 F.3d at 62.

B. The Fifth Circuit's Decision Cannot Be Reconciled With Decisions of This Court

Not only does the Fifth Circuit's decision conflict with the decisions of other courts of appeal, it is plainly incorrect under this Court's decisions. In *United States Department of Treasury v. Fabe*, this Court considered whether a claim-

priority statute in a state insurer liquidation act regulated the business of insurance. *Fabe*, 508 U.S. 491, 496-97 (1993). The state priority statute was part of a "complex and specialized administrative structure" that regulated "insurance companies from inception to dissolution." *Id.* at 494. The state liquidation statute in *Fabe* "proclaim[ed] as its purpose, 'the protection of the interests of insureds, claimants, creditors, and the public generally.'" *Id.*

In *Fabe*, this Court rejected the argument that *any* state law that indirectly benefits policyholders is exempt in its entirety from preemption by a conflicting federal law. *Id.* at 508-09 & n.8. Rather, the Court explained that each provision must be analyzed separately. After engaging in that analysis, the Court concluded that a provision of the state priority statute giving policyholders a direct benefit -- first priority over other creditors -- was exempt as a law regulating the "business of insurance." *Id.* at 508. The only other provision of the statute that was held to regulate the "business of insurance" was a provision giving priority to the payment of administrative expenses. *Id.* at 509. Although the benefit to policyholders of paying administrative expenses was indirect, ensuring payment of such expenses was necessary for the liquidation to *begin*; it did not merely make the liquidation more "orderly" or "manageable." *Id.*

The Fifth Circuit's conclusion that the OUILA's jurisdictional and injunction provisions are laws enacted to

regulate the business of insurance contravenes *Fabe*.[12] Like the priority provisions in *Fabe* found not to contain preemptive force, provisions enabling consolidation of all proceedings in a single court are not essential to the State's ability to liquidate insolvent insurance companies. Indeed, the OUILA (like similar statutes in other states) only provides for home court exclusive jurisdiction over "delinquency proceedings." Okla. Stat. tit. 36 § 1902. "Delinquency proceedings" are proceedings: (i) "commenced [by the Insurance Commissioner] against an insurer"; (ii) "pursuant to [the OUILA]"; (iii) "for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer." *Id.* §§ 1901, 1903. Federal court proceedings that are: (i) commenced by individuals or corporations; (ii) pursuant to federal statutes; (iii) for the purpose of enforcing federal rights, are *not* delinquency proceedings over which the state has asserted exclusive jurisdiction. *See id.* §§ 1901-03. Further, the OUILA expressly provides that controverted claims belonging to claimants in reciprocal states may *be proved in ancillary proceedings in those states. Id.* § 1916.

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[12] The Fifth Circuit's suggestion in dictum that the entire OUILA regulates the "business of insurance," is also irreconcilable with *Fabe*. Under the Fifth Circuit's analysis, the entire priority provision in *Fabe* – one piece of a statutory scheme like the OUILA – would have been exempt from preemption by the conflicting federal priority statute. This Court, however, held otherwise. *Fabe*, 508 U.S. at 508-09. Although the Fifth Circuit stated that this Court's holding in that respect was "unclear" (App. 17a), this Court expressly rejected the broad approach suggested by the Fifth Circuit. *Fabe*, 508 U.S. at 509 n.8.

Moreover, the jurisdictional and injunction statutes do not directly benefit policyholder-creditors. A single consolidated proceeding only benefits policyholders indirectly, if at all. In this respect, these statutes are fundamentally unlike the priority accorded policyholders in *Fabe*. They are also unlike the priority given administrative expenses in *Fabe*. These provisions are like the priority provisions in *Fabe* and the late notice of claim statute in *Garcia* that were found to be without preemptive force because -- at best -- they only affected creditors as a whole.

The Fifth Circuit's decision also fails to apply the three-part test for determining whether a particular practice is the business of insurance as established in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119 (1982). Under *Pireno*, a practice is not the "business of insurance" unless it: (1) "has the effect of transferring or spreading a policyholder's risk"; (2) "is an integral part of the policy relationship between the insurer and the insured"; and (3) "is limited to entities within the insurance industry." *Id.* at 129. The jurisdictional and injunction statutes meet none of the *Pireno* requirements.

The statutes do not affect the transfer of risk. They are merely procedural provisions with no bearing on ENIC's substantive liability. *See Fragoso*, 991 F.2d at 881-82; *cf. Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987) (arbitration does not affect parties' substantive rights); *Bennett*, 968 F.2d at 972 (same).

Mandating that all actions against an insurance company be brought in state court in the insurance company's domicile also is not an integral part of the policy relationship between insurer

and insured. *See, e.g., Champion Int'l Corp. v. Continental Cas. Co.*, 546 F.2d 502 (2d Cir. 1976) (policyholder action against insurance company for coverage under policy); *Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.*, 597 F. Supp. 1515 (D. D.C. 1984) (policyholder action against insurance company for coverage under policy); *see also Federal Trade Comm'n v. Travelers Health Ass'n,* 362 U.S. 293, 302 (1960) (noting the "unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated").

Finally, neither a plaintiff's "practice" of choosing a forum to litigate the debt of a company nor Oklahoma's purported "policy" of consolidating all actions against insolvent domestic insurers in a single state court are limited to entities within the insurance industry. Plaintiffs other than insurance entities regularly select forums -- both before and after disputes arise -- in which to litigate. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (forum selection clause in towing agreement should have been honored). Under the Fifth Circuit's reasoning, all parties -- including non-insurance entities -- are also enjoined and relegated to the state court. In the Fifth Circuit's view, the statutes would preempt an employee's action to establish ENIC's liability under federal law for unlawful discrimination, or a Texas paper company's action to establish that ENIC breached a contract in Texas for the purchase and sale of the paper on which it wrote its Texas policies.

The Fifth Circuit's decision is also at odds with *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979). In *Royal Drug*, this Court held that pharmacy

agreements implementing prescription drug benefits for policyholders were not the "business of insurance" even though policyholders' premiums might ultimately be lowered as a result of cost savings from the agreements. *Id.* This Court held that whatever the exact scope of the term "the business of insurance" it is clear that the focus is "on the relationship between the insurance company and the policyholder." *Id.* at 216. The jurisdictional and injunction statutes are not focused on the relationship between Oklahoma insurance companies and their policyholders. Okla. Stat. tit. 36 §§ 1902, 1904. At best, the policyholder "benefit" is both indirect and highly speculative. The provisions *may* result in cost savings, which if passed along to creditors, *may* result in policyholder-creditors getting a greater distribution.

In *Royal Drug*, however, this Court held that the term "business of insurance" should not be read so broadly that it would encompass any practice intended to minimize costs. In that sense, the "manager of an insurance company is no different from the manager of any enterprise with the responsibility to minimize costs and maximize profits." *Royal Drug*, 440 U.S. at 217; *see also S.E.C. v. National Sec., Inc.*, 393 U.S. 453, 459-60 (1968) (McCarran-Ferguson Act not intended to give states sole authority to regulate all activities of insurance companies, it was only intended to allow states to regulate the business of insurance). A provision requiring all insurance company liquidators to purchase office supplies from a single supplier also might result in cost savings that could be passed along to policyholder-creditors. Such a provision would be a law regulating the business of insurance under the Fifth Circuit's reasoning.

The Fifth Circuit's holding, that laws regulating the manner and court in which a debt can be established are laws regulating the business of insurance if the alleged debtor is an insurance company, conflicts with this Court's holdings on the scope of the McCarran-Ferguson Act and will tend to cause confusion regarding the scope of state power to regulate insurance companies.

C. The Fifth Circuit's Reasoning Is Fundamentally Inconsistent With This Court's Decisions Regarding the Purpose and Goals of the FAA

The Fifth Circuit's decision that the FAA conflicts with the OUILA is premised on its assumptions that: (i) creditors who were policyholders will receive the benefit if an insolvent insurer saves administrative expenses;[13] and (ii) litigating all disputes against an insolvent insurer in a single state proceeding instead of ordering arbitrable disputes arbitrated, will save administrative expenses. (*See* App. 18a-19a.) Even if the first assumption were valid, there is a fundamental inconsistency

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[13] Policyholder claims against insolvent insurers often are paid, fully or partially depending on the amount of the claim, by state insurance guaranty funds. When needed, a guaranty fund will assess its members – financially sound insurers authorized to conduct business in the state – a percentage of applicable premiums to fund the payments. *See Best's Insurance Reports, Property-Casualty United States,* Vol. II: K-Z, at A2 (1997). Thus, although the solvent insurer members might benefit if the liquidator saves administrative expenses, whether policyholders will benefit from such savings is entirely speculative.

between this Court's FAA cases and the Fifth Circuit's assumption that divesting federal courts of the power to enforce arbitration agreements will save administrative expenses.

This Court often has recognized that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural law to the contrary." *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA was enacted to overrule longstanding judicial hostility toward arbitration and to encourage arbitration as a way to resolve disputes efficiently and quickly. *E.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). Indeed, the hallmarks of arbitration are its "adaptability and access to expertise." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). The proceedings are streamlined and the results are generally obtained expeditiously. *Id.* The typical reason parties choose arbitration is their desire to keep the effort and expense of resolving disputes manageable. *Id.*; Barger & Quinn, *supra*, at 235; Binning & Moll, *supra*, at 957. These goals are compatible with a desire to conserve the assets of an insolvent insurer.

The Fifth Circuit's suggestion that Petitioners simply may file a petition in state court to compel arbitration (App. 22a n.5, 26a), is also inconsistent with this Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). In *Quackenbush*, this Court held that, under *Burford*, the federal court could not remand a dispute between a reinsurer and an insolvent California insurer to the state court. *Id.* at 731. As in this case, the reinsurer had moved the federal court to compel arbitration under the FAA. *Id.* at 728-29. California had placed

the insurer into liquidation under a comprehensive liquidation act like Oklahoma's. *See* Petitioner's Brief ("*Quackenbush* Br.") at 3-4, in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706. The liquidator claimed that the underlying proceedings were *in rem* or *quasi in rem*, and that by enacting the McCarran-Ferguson Act, Congress mandated that the insurance industry would be a "state enclave." *Quackenbush* Br. at 4.

In *Quackenbush*, the state court assumed "sole and exclusive" jurisdiction over all estate assets (including reinsurance recoverables), and enjoined all proceedings against the liquidator. *Quackenbush* Br. at 8-9 & n.19-20. Quackenbush argued that the states had the paramount interest in regulating the business of insurance under the McCarran-Ferguson Act, and remanding the petition would not put the reinsurers "out of court" because they could still pursue their arbitration claims in state court. *Quackenbush* Br. at 24-25.

This Court did not address Quackenbush's arguments regarding the McCarran-Ferguson Act directly, but it did address the significant federal policy embodied in the FAA, noting:

> [T]he federal interests in this case are pronounced, as [the reinsurer's] motion [against the liquidator of an insolvent insurer] to compel arbitration under the [FAA] implicates a substantial federal concern for the enforcement of arbitration agreements.

Quackenbush, 517 U.S. at 728-29. Further, this Court implicitly recognized that not all disputes involving insolvent insurance companies are matters of substantial state concern.

See id. at 729. Finally, this Court rejected the liquidator's claim that a remand to the state court would not put the reinsurers out of court, stating that "out of court" meant out of federal court. *Id.* at 714. Like the reinsurers in *Quackenbush*, Petitioners should not be put out of federal court and relegated to the Oklahoma state court to enforce their federal right to arbitrate.

This case implicates the substantial federal policy favoring enforcement of arbitration agreements reflected in *Quackenbush* and this Court's other FAA decisions. The Fifth Circuit's assumption that arbitration will waste assets that would be conserved in liquidation, cannot be reconciled with this Court's pronouncements regarding the FAA.

II. THE FIFTH CIRCUIT'S DECISION THAT STATE COURTS CAN ENJOIN *IN PERSONAM* ACTIONS IN FEDERAL COURT, CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT

A. The Fifth Circuit's Decision Conflicts With Decisions of Other Circuits

Review by this Court is also warranted because the Fifth Circuit's conclusion that anti-suit injunctions in state insurer liquidation orders are binding on federal courts, conflicts with decisions of the First and Eighth Circuits.

In *Murff v. Professional Medical Insurance Co.*, 97 F.3d 289 (8th Cir. 1996), the Missouri court's order placing the insurer into liquidation contained an anti-suit injunction similar to the injunction in ENIC's liquidation order. *Id.* at 290. While the

OUILA is permissive, i.e., the liquidation court *may* enjoin actions interfering with the delinquency proceeding, Missouri's insolvency act contains a self-executing injunction statute, which provides that no existing action can be maintained outside the liquidation court after a liquidation order is issued and that all existing actions will be converted to claims in the liquidation court. *Id.*; *see also* Mo. Rev. Stat. § 375.1188(1). The Eighth Circuit's conclusion that state courts cannot enjoin federal court actions, *Murff*, 97 F.3d at 290 n.2, squarely conflicts with the Fifth Circuit's conclusion that state courts can do so (App. 24a-25a).

This aspect of the Fifth Circuit's decision also squarely conflicts with the First Circuit's opposite conclusion in *Fragoso*. In *Fragoso*, the state court ordered all proceedings against an insolvent insurer stayed and all claims against the insurer remitted to the state court. *Fragoso*, 991 F.2d at 880. Notwithstanding an injunction statute similar to OUILA, the First Circuit held that the liquidation order injunction was not binding on the federal court because a state court cannot enjoin federal proceedings. *Id.* at 882.

B. The Fifth Circuit's Decision Conflicts With This Court's Prior Decisions on State Court Anti-Suit Injunctions

The Fifth Circuit's conclusion that a state court anti-suit injunction bars *in personam* federal court proceedings contravenes this Court's prior rulings. This Court has expressly held that:

> [S]tate courts are *completely without power* to restrain federal court proceedings in in personam actions . . . And it does not matter that the prohibition . . . [is] addressed to the parties rather than to the federal court itself.

Donovan v. Dallas, 377 U.S. 408, 413 (1964) (emphasis added); *see also Moses H. Cone*, 460 U.S. at 21 n. 24 ("Of course, we do not mean to say that the state court's injunction could properly have been applied to prevent [the] filing [of] a federal lawsuit."); *General Atomic Co. v. Felter*, 434 U.S. 12, 18-19 (1977) (state courts may not restrict the right to pursue federal remedies and take advantage of federal procedures under the FAA).

The Fifth Circuit's decision "that the FAA is reverse pre-empted under the McCarran-Ferguson Act, thereby leaving the district court without the power to compel arbitration in this case" (App. 26a) achieved the very result that the court of appeals expressly stated it did not reach -- "that Oklahoma law divested the district court of its diversity jurisdiction" (App. 25a). As there is no "federal question" jurisdiction under the FAA, the power of the district court to compel arbitration under the FAA is derived from its diversity jurisdiction, *see* U.S. Const. art. III, § 2, cl. 1; 28 U.S.C.A. § 1332(a) (West 1993 & Supp.); Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 13 *Federal Practice and Procedure* § 3521 (1984).

Further, the Fifth Circuit's decision suggests that, in enacting the McCarran-Ferguson Act, Congress created an "insurance bankruptcy" type power in the states to enjoin *in personam* actions in the district court, where a federal remedy conflicts with state laws regulating the business of insurance. (*See* App.

24a-25a.) Thus, under the Fifth Circuit's reasoning, Congress implicitly relaxed the well-settled rule, announced in *Donovan* and its progeny, that state courts are without the power to enjoin *in personam* actions in federal court. The effect of the Fifth Circuit's decision is to divest the federal court of its diversity jurisdiction. Because these are important issues of federalism, with national and international import, this Court's review of the Fifth Circuit's decision is warranted.

III. IF NOT REVIEWED, THE FIFTH CIRCUIT'S DECISION WILL CAUSE CONFUSION AND MISUNDERSTANDING IN THE LAW

Unless reviewed by this Court, the Fifth Circuit's decision will cause confusion and misunderstanding in the law regarding whether state procedural laws reverse preempt federal laws under the McCarran-Ferguson Act. The Fifth Circuit's decision creates confusion as to whether a federal law invalidates, impairs, or supersedes a state law for McCarran-Ferguson Act purposes, if the federal and state laws achieve the same goal by different means. The decision also creates confusion as to whether procedural laws regulating the forum in which litigants can commence an action are laws regulating the "business" of insurance if an insurance company is a party to the action. Finally, unless reviewed, the decision will lead to confusion regarding whether a State can prohibit citizens of other states from commencing or maintaining actions in federal court against the state's domestic insurance companies and can instead require all such actions -- by state residents and nonresidents alike -- be brought in a state court in the insurance company's home state.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10302

MUNICH AMERICAN REINSURANCE COMPANY;
NAC REINSURANCE CORPORATION,

Plaintiffs-Appellants,

versus

JOHN P. CRAWFORD, Insurance Commissioner
of the State of Oklahoma, as Receiver of
Employers National Insurance Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas

June 2, 1998

Before JOLLY, DUHÉ, and PARKER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge

The dispute in this appeal is about who will decide the entitlement to a $1.5 million pile of money--arbitrators pursuant to the Federal Arbitration Act (the "FAA"), or the Oklahoma state insurance regulators and courts under the McCarran-Ferguson Act. Or, perhaps, the more specific question is who gets to decide who will decide the entitlement question--the federal courts or the state courts. There are, however, several questions we must address before we reach the ultimate disposition of this appeal. The first question is one of jurisdiction: whether the district court had jurisdiction to reconsider its initial order compelling arbitration of the dispute. We next consider whether the district court correctly invoked the *Burford* abstention doctrine to dismiss the action to compel arbitration. Finally, we consider whether state laws governing insurance company delinquency proceedings reverse pre-empt the FAA under the McCarran-Ferguson Act. Although we hold that *Burford* abstention was improper, we conclude that jurisdiction was proper, that the FAA was reverse pre-empted by Oklahoma law under the McCarran-Ferguson Act, and that this dispute is one for the State of Oklahoma to resolve. We, accordingly, affirm the district court's dismissal of the petition to compel arbitration.

I

On January 1, 1986, Employers National Insurance Corporation ("ENIC") and its parent corporation, Employers Casualty Company ("ECC"), entered into reinsurance agreements with Munich American Reinsurance Company

("Munich") and NAC Reinsurance Corporation ("NAC"). Munich and NAC entered into reinsurance agreements with ECC and ENIC to cover ENIC's potential losses under a prior insurance contract (the "umbrella policy") issued by ENIC to Jobs Building Services, Inc. ("Jobs"). Under the reinsurance agreements, Munich and NAC agreed to insure ENIC for a percentage of the net loss on claims paid by ENIC under the umbrella policy. "Net loss" was defined as "all payments by [ENIC] in settlement of claims or losses, payment or benefits, or satisfaction of judgments or awards, after deduction of salvage." "Salvage" was in turn defined as "any recovery made by [ENIC] in connection with a claim or loss, less all expenses paid by [ENIC], other than payments to any salaried employee of [ENIC] making such recovery."

In 1991, ENIC paid $2,065,000 under the umbrella policy to settle a wrongful death action against Jobs. Munich and NAC maintain that ENIC submitted the claim and that each reinsurer paid $829,250 on the reinsurance agreements. ENIC later brought an action in Texas against the underlying insurer in the Jobs wrongful death suit. The case was settled for $2.5 million following an unsuccessful appeal.

On February 14, 1994, prior to the time that the settlement was entered, an Oklahoma state court placed ENIC into liquidation.[1] John R. Crawford, the Insurance Commissioner of Oklahoma, was appointed ENIC's receiver for the ensuing

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[1] ECC had also been placed in receivership by its state insurance commissioner.

delinquency proceedings. The court's liquidation order authorized and directed Crawford to take all actions necessary and appropriate to accomplish ENIC's liquidation in accordance with the Oklahoma Uniform Insurers Liquidation Act. The order vested Crawford with title to all property of ENIC and directed him to take immediate and exclusive possession of such property wherever located or thereafter discovered. It also enjoined any action against ENIC, Crawford, or any of ENIC's assets.

Consistent with the liquidation order, ENIC's attorneys remitted to Crawford $1.5 million from settlement of the wrongful death action, net of attorneys fees. Munich and NAC contacted Crawford, asserting a vested property right in the proceeds. They urged that these proceeds, as salvage under the reinsurance agreements, were not part of the ENIC estate, but being held in trust for them. Crawford insisted that the proceeds were not salvage because, based on ENIC's books and records, ENIC never sought or received reimbursement from Munich, NAC, or ECC for the underlying claims. When Crawford refused to remit the money, Munich and NAC requested that he submit the dispute to arbitration as called for by the reinsurance agreements. Crawford again refused.

Finally, on July 18, 1996, Munich and NAC filed a petition in federal district court to compel arbitration under the FAA, 9 U.S.C. § 4. On September 18, 1996, the district court entered an order finding that ENIC was a party to the reinsurance agreements and compelling the parties to submit the dispute to arbitration. Crawford moved for a new trial, a rehearing, or an amendment to the judgment under Rule 59(e) of the Federal

Rules of Civil Procedure. It was on this motion that the district court first learned of the state court injunction. On October 8, 1996, the district court denied Crawford's motion, noting, however, that principles of comity and federalism required the state court to interpret and enforce its injunction with the appropriate contempt order if necessary. As a result, Crawford filed a motion in state court seeking specifically to enjoin the federal arbitration order and to find Munich and NAC in contempt for violating the previous injunction. Munich and NAC responded with a motion in the federal district court for an injunction forcing Crawford to comply with the arbitration order.

On November 14, 1996, the district court denied Munich's and NAC's motion. The court also took the opportunity to clarify its earlier order, stating:

> [W]hether Petitioners violated the state court injunction by filing this action is a matter for the state court to determine. If the state court determines that the filing of this action violated its injunction, this Court will respect that decision by vacating the arbitration order and dismissing the case. Except in exceptional circumstances, it is the policy of this Court to refrain from interfering with an ongoing state court proceeding.

Accordingly, the district court directed Crawford to file a motion to dismiss the instant action if the state court determined that its injunction had been violated. On January 13, 1997, the state court found that Munich and NAC had violated the injunction issued at the outset of ENIC's delinquency

proceedings by petitioning the federal district court to compel arbitration.

Pursuant to the district court's November 14 order, Crawford filed a motion to dismiss the action to compel arbitration. Munich and NAC argued that abstention was inappropriate in this case and that Crawford was estopped from asserting this issue by his delay in raising it. Crawford responded that the FAA was reverse pre-empted by the McCarran-Ferguson Act and that abstention was therefore appropriate. In the event dismissal was not appropriate, Crawford also requested a stay of the district court proceedings. On February 27, 1997, the district court granted Crawford's motion to dismiss under the *Burford* abstention doctrine. Munich and NAC appeal.

II

Munich and NAC first contend that the district court lacked jurisdiction to reconsider its October 8 order denying Crawford's Rule 59(e) motion because Crawford did not timely appeal or otherwise challenge that order. Crawford responds that in cases where *Burford* abstention is appropriate, it can be ordered at any time, even on appeal. Although we agree with Crawford that *Burford* abstention may be raised at any time, *see Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249, 255 (5th Cir. 1990), we ultimately conclude, as explained below, that *Burford* abstention was inappropriate in this case. Nevertheless, based upon our review of the district court's orders, we are confident that the district court maintained jurisdiction to issue the abstention order.

The district court's October 8 order reflects its intention to retain jurisdiction over the case until the state court resolved the injunction issue. In the October 8 order, the district court denied the Rule 59(e) motion, but altered the finality of its earlier judgment by effectively reserving the right to revisit that judgment pursuant to appropriate state court action. Having now been informed of the state court injunction, the district court concluded that principles of comity and federalism prevented it from interfering with ongoing state court proceedings and that the state court should enforce its own injunction, citing *Trainor v. Hernandez*, 431 U.S. 434 (1977), and *Younger v. Harris*, 401 U.S. 37 (1971). This language evinces the district court's intent to make its September 18 order compelling arbitration conditional pending the state court's resolution of the scope and effect of its injunction.

Our conclusion in this respect is confirmed by the November 14 order, which merely clarified the district court's already-stated position. The November 14 order came as a result of a petition *by Munich and NAC*--not a tardy motion by Crawford or a *sua sponte* reconsideration by the district court--to enforce what they apparently believed was a final order compelling arbitration. As the district court explained, however, "[a]fter considering the [petition], the Court is of the opinion that it should be denied and that the Court's position regarding a previous state court injunction should be clarified." The petition prompted the district court to make explicit what it thought was clear in its October 8 order, namely, that if the state court's injunction had been violated, the district court would respect that decision by vacating the arbitration order and dismissing the case. Thus, when the court finally abstained and

dismissed this action on February 27, 1997, it was in compliance with and in fulfillment of its previous orders. For these reasons, we conclude that the district court had not relinquished jurisdiction over this matter when it compelled arbitration on September 18.

Because the district court's order of abstention and dismissal is a final order disposing of all issues pending in the federal suit between the present parties, we have jurisdiction to hear this appeal under 28 U.S.C. § 1291. *See Clark v. Fitzgibbons*, 105 F.3d 1049, 1051 (5th Cir. 1997). We review the district court's decision to abstain for abuse of discretion, taking care to ensure that the decision fits within the specific limits prescribed by the particular abstention doctrine involved. *Id.*

III

Munich and NAC contend that the district court erred by invoking *Burford* abstention and dismissing the present action because the FAA does not vest the district court with discretion to deny arbitration, which is a prerequisite to *Burford* abstention. They further contend that, even if the *Burford* abstention doctrine were available in this case, arbitration of the dispute between Munich, NAC, and Crawford would not unnecessarily interfere with ENIC's ongoing state court delinquency proceedings, thus, making *Burford* abstention inappropriate. Crawford, on the other hand, argues that the district court had no power to compel arbitration because, to the extent the FAA impedes Oklahoma's efforts in regulating the business of insurance and the liquidation of insurance

companies, it is reverse pre-empted by the McCarran-Ferguson Act.

A

We first consider whether the district court properly invoked the *Burford* abstention doctrine to dismiss the reinsurers' petition to compel arbitration. *Burford* abstention is appropriate in two circumstances: (1) cases involving difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case, or (2) where federal adjudication of the case would disrupt state efforts to establish a coherent policy with respect to matters of substantial public importance. *See New Orleans Public Serv., Inc. v. Counsel of City of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*"). Furthermore, it is true, as argued by Munich and NAC, that *Burford* abstention is permissible only when the district court has discretion to grant or deny relief. *See Quackenbush v. Allstate Ins. Co.*, 116 S.Ct. 1712, 1721-22 (1996).[2]

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[2] Prior to *Quackenbush*, we and other courts had consistently approved *Burford* abstention in actions against an insurance company involved in ongoing state delinquency proceedings. *See, e.g., Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529 (5th Cir. 1992); *Martin Ins. Agency, Inc. v. Prudential Reins. Co.*, 910 F.2d 249 (5th Cir. 1990); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38 (2d Cir. 1986); *Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d

(continued...)

Here, the relief Munich and NAC sought from the district court was neither equitable nor otherwise committed to its discretion. Munich and NAC petitioned the district court under the FAA for a determination that their dispute with Crawford was subject to an arbitration clause and for an order compelling the parties to submit the matter for arbitration. The FAA provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citing 9 U.S.C. §§ 3 & 4). Having determined that the reinsurance agreements contained valid and binding arbitration clauses, the district court had no discretion under the FAA to deny Munich and NAC their right to an order compelling arbitration, at least as to an interpretation of the rights and remedies provided under

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[2] (...continued)
1033 (3d Cir. 1988); *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988). Moreover, these cases upheld *Burford* abstention in such actions without regard for the type of relief being sought in federal court. *See, e.g., Wolfson*, 51 F.3d at 147; *Lac D' Amiante*, 864 F.2d at 1044.

the reinsurance agreements. The district court, therefore, abused its discretion in invoking *Burford* abstention in this case.[3]

B

The question remains, then, whether dismissal was nonetheless required because, as Crawford contends, the FAA is reverse pre-empted by the McCarran-Ferguson Act.[4] Congress enacted the McCarran-Ferguson Act, 15 U.S.C. § 1101, *et seq.*, for the specific purpose of consigning to the States broad and primary responsibility for regulating the insurance industry. *See SEC v. National Sec., Inc.*, 393 U.S. 453, 458 (1969); *Barnhardt Marine Ins., Inc. v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531 (5th Cir. 1992). In relevant part, the Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the

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[3] We do not reach the question whether, if arbitrators were to determine that the nature of the relief Munich and NAC seek in the underlying claim is equitable, the district court may abstain from enforcing the award.

[4] Munich and NAC argue that *Quackenbush* disposes of this case in Munich's favor. That case, however, never addressed the McCarran-Ferguson Act. Nor does it appear that the lower courts ever considered the applicability of the McCarran-Ferguson Act or that the parties even raised the issue in *Quackenbush*. *See Garamendi v. Allstate Ins. Co.*, 47 F.3d 350 (9th Cir. 1995).

> purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). Ordinarily, federal law pre-empts conflicting state law by virtue of the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. The McCarran-Ferguson Act reverses that effect in the narrow range of cases involving state regulation of the insurance industry.

By its terms, the Act permits a state law to reverse pre-empt a federal statute only if: (1) the federal statute does not specifically relate to the "business of insurance," (2) the state law was enacted for the "purpose of regulating the business of insurance," and (3) the federal statute operates to "invalidate, impair, or supersede" the state law. There is no question that the FAA does not relate specifically to the business of insurance. Thus, we need only address the last two requirements.

(1)

The category of laws enacted "for the purpose of regulating the business of insurance" is broad and consists of those laws "that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *United States Treasury Depot v. Fabe*, 508 U.S. 491, 505 (1993) (quoting *Black's Law Dictionary* 1236, 1286 (6th ed. 1990)). Statutes that focus on protecting the relationship between the insurer and insured are laws regulating the business of insurance. *Id.* at 501. The three criteria relevant in determining whether a regulated practice properly involves the relationship between the insurer and insured include whether: (1) the practice has the effect of

transferring or spreading a policyholder's risk; (2) the practice is an integral part of the policy relationship between the insurer and the insured; and (3) the practice is limited to entities within the insurance industry. *Union Labor Life Ins. Co. v. Perino*, 458 U.S. 119, 129 (1982). None of these criteria is dispositive. *Id.*

(a)

In this case, the Oklahoma laws in question are the provisions of the Oklahoma Uniform Insurers Liquidation Act ("OUILA"), which regulate delinquency proceedings in connection with insolvent insurance companies. *See* 36 Okl. St. Ann. § 1901, *et seq.* When an Oklahoma insurance company is declared insolvent and placed into state delinquency proceedings by the state insurance commissioner, the district court of Oklahoma County is vested with "exclusive original jurisdiction" over all delinquency proceedings. *See* §§ 1903 & 1902(A). These proceedings are intended to be "the sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving" the insurance company. § 1902(B). The insurance commissioner, as receiver of the estate, is directed to take immediate possession of all of the insurance company's assets and is "vested by operation of law with title to all of the property, contracts, and rights of action . . . of the insurer, wherever located." §§ 1914(A) & (B). To assure orderly disposition of these assets and management of the company's affairs, OUILA further provides comprehensive procedures for the resolution and prioritization of claims against the company. *See* §§ 1903-20.

OUILA also provides Oklahoma courts with broad powers to enforce the provisions governing delinquency proceedings, such as the power to make "all necessary and proper orders to carry out the purposes of [OUILA]." *See* § 1902(A). Once delinquency proceedings have commenced, the court may issue an injunction to prevent interference with the receiver, waste of the insurer's assets, or the "commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof." § 1904(B). The Oklahoma court in this case issued just such an injunction, precluding Munich from commencing or prosecuting the FAA action in federal district court. The existence of this injunction later served as the basis for the district court's decision to dismiss Munich's FAA petition.

(b)

Crawford argues that OUILA serves the purpose of regulating the business of insurance and, therefore, falls within the scope of the McCarran-Ferguson Act. His position draws substantial support from the Second Circuit's decision in *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995). On facts that run parallel to those in this case, the Second Circuit held that the Kentucky Liquidation Act reverse pre-empted the FAA by operation of the McCarran-Ferguson Act. *See id.* at 45. Kentucky had enacted a comprehensive scheme for the liquidation of insolvent insurance companies, including a provision nullifying the effect of arbitration clauses against the receiver. The appellees, reinsurance companies seeking to compel arbitration regarding their rights of setoff

under the reinsurance agreements, argued that the anti-arbitration provision was not enacted to protect policyholders and deprived them of their bargained-for right to arbitration. *See id.* The Second Circuit refused to limit its focus to the anti-arbitration provision, but instead, examined the Kentucky Liquidation Act as a whole. It concluded that the Act protected policyholders "by assuring that an insolvent insurer will be liquidated in an orderly and predictable manner and the anti-arbitration provision is simply one piece of that mechanism." *Id.*

Like Kentucky, Oklahoma "has formulated a complex and comprehensive scheme of insurance regulation which contains the Uniform Insurers Liquidation Act for the liquidation of an insolvent insurer." *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 705 (10th Cir. 1988) (ordering *Burford* abstention in case against insurance company involved in delinquency proceedings in Oklahoma state court). It, like most States, enacted these laws under the shield provided by the McCarran-Ferguson Act. *Cf., e.g., Hartford Cas. Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426 (7th Cir. 1990) (Illinois law); *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 43 (2d Cir. 1986) (New York law). Oklahoma courts, whom we must recognize in our federal system as the primary expositors of Oklahoma law and public policy, have expressly declared that "Oklahoma's Uniform Insurers Liquidation Act is designed to protect the public in general, and *policyholders of an insolvent insurer in particular*." *Cockrell v. Grimes*, 740 P.2d 746, 749 (Okl. Ct. App. 1987) (emphasis added); *accord Motor Club of Am. v. Weatherford*, 841 F. Supp. 610, 618 (D.N.J. 1994) ("[OUILA's] breadth reflects the need to fully protect the

insolvent insurer's policyholders, who are generally unfamiliar with the financial condition of the insurer and rely on state regulation to ensure that the promise of payment on their insurance policies at some future date will come to fruition.").

Furthermore, at least two of the three *Perino* factors suggest that this comprehensive regulatory scheme, viewed in its entirety, regulates the business of insurance. First, it is crucial to the relationship between the insurance company and its policyholders for both parties to know that, in the event of insolvency, the insurance company will be liquidated in an organized fashion. *See Stephens*, 66 F.3d at 44-45; *Lac D' Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1041 n.9 (3d Cir. 1988); *Blackhawk Heating & Plumbing Co. v. Geeslin*, 530 F.2d 154, 159-60 (7th Cir. 1976). Second, OUILA is limited to entities in the insurance industry. It does not apply to insolvent companies generally, but only to insolvent insurance companies. *See* 36 Okl. Stat. Ann. §§ 1901-1903. In short, "[r]ecognition by this Court of the effectuation of the liquidation of [ENIC] by the State of [Oklahoma] is in accordance with federal policy which directs that the control over the insurance business remain in the hands of the states." *Anshutz v. J. Ray McDermott Co., Inc.*, 642 F.2d 94, 95 (5th Cir. Unit A Mar. 1981) (staying appeal as result of state court injunction restraining interference with ongoing liquidation of insurance company).

(c)

Munich and NAC contend, however, that *Fabe* rejected the notion that we may consider OUILA as a whole in determining

whether it was enacted for the purpose of regulating the business of insurance. *Fabe* indeed offers some support for their position. There, the issue was whether, under the McCarran-Ferguson Act, a federal priority statute was reverse pre-empted by a conflicting Ohio priority statute that was part of a "complex and specialized administrative structure" designed for the regulation of insurance company insolvency. *See* 508 U.S. at 493-94. The Ohio statute provided sequential priority for (1) administrative costs, (2) specified wage claims, (3) policyholders' claims, (4) general creditors' claims, and (5) government claims. *See id.* at 495. The federal statute gave the federal government first priority. *See id.* Examining each priority provision of the Ohio statute separately, the Court held that the priorities for administrative costs and policyholder claims displaced the federal priority, but that the federal priority trumped all other claims. *See id.* at 509. The Court reasoned that the Ohio statute was enacted for the purpose of regulating the business of insurance to the extent it regulated policyholder interests. *Id.* at 508. But to the extent that the statute was designed to further the interests of other claimants, it did not have such a purpose. *See id.*

Certainly, *Fabe*'s holding and analysis suggest that a statute may require parsing to determine the extent of its pre-emptive power under the McCarran-Ferguson Act. At the same time, however, the Court stopped short of directing that this approach be taken in every case. *See id.* at 509 n.8. *Fabe*'s holding in this respect is simply unclear. *Compare Antonio Garcia v. Island Program Designer, Inc.*, 4 F.3d 57, 61-62 (1st Cir. 1993) (every provision must be parsed), with *Stephens*, 66 F.3d at 45 (statutory scheme may be considered in its entirety).

This uncertainty need not concern us today, however, because even if we are required to parse OUILA, the specific provisions of the statute at issue here--vesting exclusive original jurisdiction of delinquency proceedings in the Oklahoma state court and authorizing the court to enjoin any action interfering with the delinquency proceedings--are laws enacted clearly for the purpose of regulating the business of insurance. These provisions give the state court the power to decide all issues relating to disposition of an insolvent insurance company's assets, including whether any given property is part of the insolvent estate in the first place. Thus, as the Tenth Circuit has recognized, "Oklahoma has not only adopted a comprehensive scheme to oversee the liquidation of insolvent insurers, it has provided a particular court . . . to oversee liquidation proceedings. The effect of this provision grants the Oklahoma County District Court a special relationship of cooperation, technical oversight and concentrated review with the Oklahoma Commissioner of Insurance in the process of liquidating insurers." *Grimes*, 857 F.2d at 705; *see also Lac D' Amiante*, 864 F.2d at 1045 (identifying same interests in New York insolvency proceedings). This special relationship contributes markedly to the orderly liquidation or rehabilitation of the insurance company and the adjudication of claims against it.

Oklahoma's policy of placing ultimate control over all issues relating to the insolvency proceedings in a single court is aimed at protecting the relationship between the insurance company and its policyholders. Insurance companies are ineligible for the protections afforded by the federal Bankruptcy Code, *see* 11 U.S.C. § 109; such protections instead are provided by state laws, which are shielded from federal interference by the

McCarran-Ferguson Act. *Clark*, 105 F.2d at 1051; *see also Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 147 (8th Cir. 1995). The experience of the federal bankruptcy courts, which evidences the importance of consolidating all of the assets of an insolvent company and the claims against those assets in a single forum, supports the legitimacy of the Oklahoma scheme in protecting the interests of policyholders. *See Levy v. Lewis*, 635 F.2d 960, 964 (2d Cir. 1980). In addition to the interests served by orderly adjudication of claims, which we have already discussed, consolidation prevents the unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the receiver had to defend unconnected suits in different forums across the country. *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157, 157 (1st Cir. 1991) (per curiam); *Lac D' Amiante*, 864 F.2d at 1045. Consolidation also eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, who are often relying on policies with the same or similar provisions. *See Gonzalez*, 946 F.2d at 157; *Lac D' Amiante*, 864 F.2d at 1047 n.16; *cf. also Martin*, 910 F.2d at 253-54 (approving *Burford* abstention to avoid risk of inconsistent adjudications). Thus, consolidation, enforced through injunctions, conserves the insurance company's assets for ultimate payment to policyholders as well as other creditors. *See Anshutz*, 642 F.2d at 95 (approving of injunctions by state receivership courts to consolidate claims against insolvent insurance companies); *U.S. Fin. Corp. v. Warfield*, 839 F. Supp. 684, 689 (D. Ariz. 1993).

Munich and NAC counter that the OUILA provisions requiring consolidation benefit all creditors in addition to policyholders and, therefore, should not be considered under *Fabe* as enacted for the purpose of regulating the business of insurance. We disagree. The Court in *Fabe* found that the Ohio provision granting a preference to expenses in administering delinquency proceedings was enacted for the purpose of regulating the business of insurance because it was "reasonably necessary" to further the goal of protecting policyholders. *See* 508 U.S. at 509. The Court reasoned that "[w]ithout payment of administrative costs, liquidation could not even commence." *Id.* Surely, the ability of a state and receiver to administer delinquency proceedings inures to the benefit of all creditors, not just policyholders. But this fact alone did not alter the insurance-related character of the Ohio provision in *Fabe*. As the Court explained in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), "[s]tatutes aimed at protecting this relationship [between an insurance company and its policyholders], directly or *indirectly* are laws regulating the 'business of insurance.'" *Id.* at 460 (emphasis added), *quoted in Fabe*, 508 U.S. at 501.

The same logic applies to the provisions of OUILA requiring consolidation of all claims related to the delinquency proceedings in Oklahoma state court. For the many reasons we have just identified, these laws are reasonably necessary to further the goal of protecting policyholders, even though they may also benefit other creditors. Some of these benefits fall more directly on policyholders than others, but none are insignificant or attenuated. In these respects, the provisions of OUILA at issue here are indistinguishable from the Ohio provision giving a preference to administrative expenses in

Fabe. Thus, we hold that these provisions were enacted for the purpose of regulating the business of insurance.

(2)

We must next consider whether the FAA operates to "invalidate, supersede, or impair" OUILA--specifically those provisions vesting exclusive original jurisdiction of delinquency proceedings in Oklahoma state court and authorizing the court to enjoin any action interfering with the insolvency proceedings. Munich and NAC contend that arbitration of their dispute with Crawford would not in any way interfere with the delinquency proceedings in Oklahoma state court. They maintain that if they have a vested property right to the settlement funds as salvage under the reinsurance agreements, the funds were never an asset of the insolvent estate, and ENIC's creditors never had a right to any portion of the funds. Thus, they argue, this dispute is not within the scope of the delinquency proceedings committed to the exclusive jurisdiction of the Oklahoma state court, and arbitration of the dispute presents no conflicts with Oklahoma law. Alternatively, they assert that if they have only a nonvested interest in damages for breach of contract, they would merely acquire a judgment lien and be forced to stand in line with the rest of ENIC's creditors. This result, they contend, is contemplated by OUILA itself.

Munich and NAC maintain, and we agree, that whether they have a vested property interest or nonvested contractual interest in the settlement proceeds is a question committed to arbitration

under the reinsurance agreements.[5] We shall not, in resolving this appeal, make our own interpretation of the agreements and thereby deny the parties their right to have this issue ultimately decided in arbitration. *Cf. Folse v. Richard Wolf Med. Instruments Corp.*, 56 F.3d 603 (5th Cir. 1995) (refusing to address dispute committed to arbitration until final award entered, despite acknowledged failings of arbitration process). Nor need we, because neither alternative leads us to the conclusion that the district court had the power to compel arbitration under the FAA.[6]

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[5] Munich and NAC argue that the existence of the Oklahoma Arbitration Act, which upholds the enforceability of arbitration clauses in contracts between insurance companies, *see* 15 Okl. Stat. Ann. § 802, suggests that arbitration under the FAA presents no conflict with Oklahoma law. We disagree. The Oklahoma Arbitration Act makes no reference to arbitration of disputes with an insurance company in delinquency proceedings. Moreover, we do not hold in this opinion that Munich and NAC have no right to arbitration; we only hold that the district court had no authority to compel it under the FAA. The Oklahoma state court might well decide to order arbitration of this dispute.

[6] We note at the outset that Munich and NAC invite us to adopt the approach taken by the Ninth Circuit in *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir. 1992). There, in a case very similar to the instant case, the Ninth Circuit rejected a receiver's argument that state insurance insolvency laws were impaired by having the dispute arbitrated under the FAA. *See id.* at 972-73. The court reasoned that "[o]nly if a court or arbitrator determines that the

(continued...)

Regardless of the nature of the reinsurers' action, ordering it resolved in a forum other than the receivership court nevertheless conflicts with the Oklahoma law giving the state court the power to enjoin any action interfering with the delinquency proceedings. Under section 1904(B) of OUILA, a

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[6] (...continued)
funds belong to [the insolvent company] does that money become part of the estate that the liquidator will distribute" and does the receiver's authority vest. *See id.* at 972. We decline the invitation to follow *Bennett*, however, because it contravenes the well established rule, applicable to both federal and state courts, that if two competing actions are *in rem* or *quasi in rem*, the court first assuming jurisdiction over the property in question exercises that jurisdiction to the exclusion of the other. *See Penn Gen. Cas. Co. v. Commonwealth of Pennsylvania* ex rel. *Schnader*, 294 U.S. 189, 195 (1935).

To the extent Munich and NAC, like the petitioner in *Bennett*, claim a vested property interest in identifiable proceeds and seek an adjudication of ownership in those proceeds, the nature of their action is *quasi in rem*. *See Shaffer v. Heitner*, 433 U.S. 186, 199 n.17 (1977); *Carney v. Sanders*, 381 F.2d 300, 302-03 (5th Cir. 1967). Likewise, the delinquency proceedings in Oklahoma state court are *in rem* or *quasi in rem* proceedings. *See H.H. Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980), *cert. denied*, 450 U.S. 1026 (1981); *Geeslin*, 530 F.2d at 158. Because the Oklahoma state court first obtained jurisdiction over the proceeds in question, it alone has the power to determine ownership of those funds. *See United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477-79 (1936) (federal court has no jurisdiction to decide in rem action for property involved in ongoing state court insurance company liquidation proceedings).

provision with breadth similar to sections 105 and 362 of the federal bankruptcy code, *see* 11 U.S.C. §§ 105 & 362, the state court is authorized to issue any injunction "deemed necessary to prevent interference with the Insurance Commissioner or the proceedings, or . . . the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof." The Oklahoma court in this case ordered just such an injunction, precluding Munich and NAC from commencing or prosecuting an action against the receiver, ENIC, or the assets of the insolvent estate. Munich and NAC, however, invoked the FAA to obtain what the state court injunction expressly prohibited--an action against ENIC's receiver to be adjudicated in a forum outside the Oklahoma state court. Although the precise degree to which a state statute may be impaired so as to trigger the McCarran-Ferguson Act is not well-settled, *see Doe v. Norwest Bank of Minnesota*, 107 F.3d 1297, 1307-08 (8th Cir. 1997), we find impairment sufficient to trigger it here.

IV

Finally, Munich and NAC argue that we should disregard the state court injunction in this case because state courts have no power to enjoin parties from pursuing federal remedies in federal court, citing cases such as *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), and *Donovan v. City of Dallas*, 377 U.S. 408 (1964). But none of these cases considered the effect of the McCarran-Ferguson Act or the broad power bestowed on States when acting, as here, pursuant

to a law enacted for the purpose of regulating the business of insurance. Authority to relax the "judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions" remains, of course, with Congress. *See Donovan*, 377 U.S. at 412-13. Congress has evinced a strong federal policy in favor of deferring to state regulation of insolvent insurance companies as reflected in the McCarran-Ferguson Act and the express exclusion of insurance companies from the federal Bankruptcy Code. *See Wolfson*, 51 F.3d at 147. These laws symbolize the public interest in having the States continue to serve their traditional role as the preeminent regulators of insurance in our federal system and indicates the special status of insurance in the realm of state sovereignty. *See Lac D' Amiante*, 864 F.2d at 1045 (citing *Levy v. Lewis*, 635 F.2d 960, 963-64 (2d Cir. 1980)); *Hartford Casualty*, 913 F.2d at 426. The provisions of OUILA vesting the state court with broad injunctive authority to prevent interference with delinquency proceedings grant no more power than that which Congress has deemed necessary to the parallel disposition of bankruptcies in federal court.

We surely are not saying that a State has the power to enjoin a party generally from pursuing federal remedies in federal court. Nor are we saying that Oklahoma law divested the district court of its diversity jurisdiction. *See Martin*, 910 F.2d at 254 (rejecting the argument that McCarran-Ferguson Act removes diversity jurisdiction from federal courts in insurance matters). What we are saying is that, by operation of the McCarran-Ferguson Act, a federal act that permits states to exert broad power over the insurance industry, state laws regulating the business of insurance may suspend federal

remedies based on conflicting federal statutes--here, the FAA. We therefore hold that the FAA is reverse pre-empted under the McCarran-Ferguson Act, thereby leaving the district court without the power to compel arbitration in this case. Munich and NAC, however, remain free to petition the Oklahoma state court for an order compelling arbitration of their dispute with Crawford.

V

In summary, we hold that *Burford* abstention was improper because the district court did not have discretion under the FAA to deny Munich and NAC their right to an order compelling arbitration in this case. We also hold, however, that the provisions of Oklahoma law vesting exclusive original jurisdiction of insurance company delinquency proceedings in Oklahoma receivership court and authorizing the court to enjoin any action interfering with such proceedings are laws enacted for the purpose of regulating the business of insurance and, therefore, fall within the scope of the McCarran-Ferguson Act. As a result, dismissal of the action was required because, by operation of the McCarran-Ferguson Act, the FAA is reverse pre-empted to the extent it permits Munich and NAC to bring an action against assets of a delinquent insurance company in a forum other than the Oklahoma receivership court. For these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

February 28, 1997 Final Judgment and Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

FINAL JUDGMENT

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that Respondent's Petition to Compel Arbitration is **dismissed without prejudice.**

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 27 day of February, 1997

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

Before the Court is the Motion to Dismiss filed by Respondent John P. Crawford. The motion is opposed. After considering the motion, the response, and the reply, the Court is of the opinion that the motion should be granted.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are

binding upon Employers National Insurance Corporation (ENIC). The Court previously granted the petition and directed the parties to commence arbitration proceedings consistent with the terms and provisions of the agreements.

Subsequently, Respondent John R. Crawford filed a motion for reconsideration, which indicated that the initial filing of this action violated an Oklahoma state court injunction entered on February 14, 1994.

This Court denied the motion for reconsideration, but stated that "the state court is the court that should interpret and enforce its injunction. If the state court determines that its injunction has been violated, it may enter the appropriate contempt order." The Court noted that it would respect the decision of the state court and indicated that the parties should be prepared to abide by the state court's decision.

On January 13, 1997, the state court entered its order ruling that the filing of this action violated its injunction. This Court will give the state court injunction full faith and credit and dismiss this action under the *Burford* abstention doctrine. *See Clark v. Fitzgibbons*, ___ F.3d ____ (1997 WL 35404) (5th Cir. Feb. 14, 1997) (*Burford* abstention appropriate under policies of McCarran-Ferguson Act). The Court will not reconsider this ruling.

It is therefore **ORDERED** that the Motion to Dismiss filed by Respondent John P. Crawford, on January 17, 1997, is **granted.**

It is **FURTHER ORDERED** that the Order Granting Petition to Compel Arbitration and Denying Respondent's Motion to Dismiss, filed September 18, 1996, is **vacated.**

It is **FURTHER ORDERED** that this action is **dismissed without prejudice** to refiling in the Oklahoma state court action.

Signed this 27 day of February 1997.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX C

November 14, 1996 Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER DENYING PETITIONERS' APPLICATION
FOR TEMPORARY RESTRAINING ORDER
AND
CLARIFYING COURT'S POSITION REGARDING
STATE COURT CONTEMPT HEARING

Before the Court is the Application for Temporary Restraining Order filed by Petitioners. After considering the application, the Court is of the opinion that it should be denied and that the Court's position regarding a previous state court injunction should be clarified.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are binding upon Employers National Insurance Corporation (ENIC). The Court previously granted the petition and directed the parties to commence arbitration proceedings consistent with the terms and provisions of the agreements.

Subsequently, Respondent John R. Crawford filed a motion for reconsideration, which indicated that the initial filing of this action violated an Oklahoma state court injunction entered on February 14, 1994.

The Court denied the motion for reconsideration, but stated that "the state court is the court that should interpret and enforce its injunction. If the state court determines that its injunction has been violated, it may enter the appropriate contempt order." It appears that a contempt hearing has been set in the Oklahoma state court for November 21, 1996.

With the present application, Petitioners seek a temporary restraining order enjoining the state court from hearing the contempt motion and an order directing the parties to promptly arbitrate the underlying dispute.

This Court will not enjoin the state court hearing and deems it necessary to clarify its previous ruling.

First, whether Petitioners violated the state court injunction by filing this action is a matter for the state court to determine. If the state court determines that the filing of this action violated its injunction, this Court will respect that decision by vacating the arbitration order and dismissing this case. Except in exceptional circumstances, it is the policy of this Court to refrain from interfering with an ongoing state court proceeding. *See, generally, Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 526 (1986); *Middlesex Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 433, 431-32 (1981); *Traynor v. Hernandez* 431 U.S. 434, 442-43 (1977); *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *Younger v. Harris*, 401 U.S. 37 (1971); *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 507-08 (5th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

Second, in the event that the state court determines that the filing of this action violated its injunction, **Crawford is directed to file a motion to dismiss with this Court.** The motion shall be accompanied by copies of the relevant state court papers and state court order. If appropriate, this Court will dismiss this case. This Court will assume that the state court has determined that there has been no violation of its injunction unless the proper motion has been filed by **December 21, 1996**.

Third, in the event that the state court determines that the filing of this action violated its injunction and Petitioners wish

to challenge the validity or scope of the injunction, relief should be sought in the Oklahoma appeals system.

Fourth, should the state court determine that the filing of this action was not in violation of its injunction, this Court considers its determination that Crawford is bound by the arbitration agreement to be final, as the time for appeal of the order compelling arbitration has expired. In this event, **this Court expects the parties to obey its order and arbitrate this dispute.**

Finally, the attorneys for both parties are advised that the Court will impose sanctions upon any attorney who multiplies the proceedings in this case unreasonably and vexatiously, *see* 28 U.S.C. § 1927; *Michael Baulch v. Robert C. Johns,* 70 F.3d 813, 817 (5th Cir. 1995), or fails to comply with the Court's decision in *Dondi Properties Corp. v. Commerce Sav. & Loan Ass*, 121 F.R.D. 284 (N.D. Tex. 1988).

It appears to the Court that both sides may have been playing "hide-the-ball" by failing to disclose the previous state court injunction until after a decision on the merits of the arbitration issue was rendered. If the injunction applies to Petitioners, valuable judicial resources have been wasted deciding, the arbitration issue. The parties should be prepared to abide by the state court's decision.

It is therefore **ORDERED** that the Application for Temporary Restraining Order filed by Petitioners, on November 8, 1996, is **denied.**

It is **FURTHER ORDERED** that the parties are directed to comply with the instructions provided above.

It is **FURTHER ORDERED** that the order directing the parties to arbitration is **stayed** until **December 21, 1996,** unless the Court orders otherwise.

It is **FURTHER ORDERED** that the agreed preliminary injunction previously entered by this Court shall remain in effect to preserve the status quo until further order of this Court.

Signed this 14 day of November, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX D

October 9, 1996 Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER DENYING RESPONDENTS MOTION
FOR NEW TRIAL, REHEARING, OR
TO ALTER OR AMEND JUDGMENT

Before the Court is the Motion for New Trial, Rehearing, or to Alter or Amend Judgment filed by Respondent John R. Crawford. After considering the motion, the Court is of the opinion that it should be denied.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are binding upon Employers National Insurance Corporation (ENIC). The Court previously granted the petition and directed the parties to commence arbitration proceedings consistent with the terms and provisions of the agreements.

With the present motion, Crawford contends that the Court erred in granting the petition by: (1) failing to set a hearing on the petition; (2) determining that the contract at issue was unambiguous; and (3) resolving conflicting issues of fact on summary judgment. Crawford alternatively seeks an order referring the action to the receivership case currently pending in the Oklahoma County District Court pursuant to an injunction entered in that case.

Crawford contends that because neither side moved for summary judgment, the Court violated the notice and hearing provisions of Rule 56. *See Matter of Hailey,* 621 F.2d 169, 171 (5th Cir. 1980). Crawford also contends that the Court cannot grant summary judgment *sua sponte*. *See Estate of Smith v. Tarrant County Hospital District,* 691 F.2d 207, 208 (5th Cir. 1982); *but see Judwin Properties, Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 436-37 (5th Cir. 1992) (stating that a district court may enter summary judgment *sua sponte* where the party

against whom judgment is entered has an opportunity to present evidence on the issues).

As an initial matter, the Court did not enter judgment in this case, SEE FED. R. CIV. P. 58, nor did it rule on the merits of the underlying dispute. The Court considered the evidence and argument presented in the petition to compel, the motion to dismiss filed by Crawford, and the reply brief, and was "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue," and directed the parties to arbitration. 9 U.S.C. § 4; *Bhatia v. Johnston*, 818 F.2d 418, 421 (5th Cir. 1987). The Court is unconvinced that the procedural requirements of Rule 56 apply to a petition to compel arbitration.

In any event, Crawford's argument that it was not on notice that the Court might grant the petition without a hearing is unconvincing, especially in light of its request for dismissal of the petition based on terms and conditions of the agreements and the exhibits and evidence presented in support of its motion.

The petition to compel is accompanied by numerous exhibits and evidence. The motion to dismiss filed by Crawford responds to the petition, contains an argument section, and is accompanied by exhibits and evidence. Crawford states in his motion, "The Petition to Compel Arbitration fails to state a cause of action for the reason that said petition and the exhibits thereto demonstrate that Employers National Insurance Corporation is not a party to the umbrella liability reinsurance agreements." Crawford also argues in his motion that because

the underlying contract is ambiguous, "a question of fact is raised as to whether Munich intended to reinsure the subsidiaries."

Although the Court disagreed with Crawford's position, he was aware that he was required to create a genuine issue of fact before he was entitled to a trial. He also attempted to do so. *See Hamman v. Southwestern Gas Pipeline, Inc.*, 721 F.2d 140, 142 (5th Cir. 1982) (no oral hearing required where party on notice and submitted responsive brief); *Kilbort v. Hampton*, 538 F.2d 90, 91 (5th Cir. 1976) (no oral hearing required).

In any event, the Court has considered the additional evidence and argument in this motion--which provides Crawford with an additional opportunity to be heard--and remains convinced that no genuine issue exists for a trial.

In a similar vain, Crawford contends that 9 U.S.C. § 4 requires that the Court conduct a hearing once it determines that the making of the agreement is in issue. The Court agrees; however, both federal procedural law and the policy driving the arbitration act counsel that the issue must be "genuine" before the Court is required to conduct an evidentiary hearing. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (the policy driving the Arbitration Act demands rigorous enforcement of agreements to arbitrate); *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1982) (Congress' clear intent of the Arbitration Act was to move parties to arbitrable disputes out of court and into arbitration as quickly and as easily as possible); *Garber v. Sir Speedy, Inc.*, 930 F. Supp. 267, 271-72 (N.D. Tex. 1995) (same), *aff'd, 91*

F.3d 137 (5th Cir. 1996); *Anderson,* 477 U.S. at 248 (a dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party).

In this case, the Court determined as a matter of law that the contract was unambiguous and binding on ENIC. There is no genuine dispute, and Crawford is not entitled to a hearing.

Crawford also contends that the Court erred in determining that the contract is unambiguous. He argues that the reinsurance agreements are "reasonably susceptible to being construed as applying only to the Texas subsidiary's, and not to ENIC."

In Texas, whether a contract is ambiguous is a question of law. *Firemans Fund Insurance Co. v. Murchison,* 937 F.2d 204, 207 (5th Cir. 1991). A contract is ambiguous if it is reasonably subject to more than one meaning. *Id.* In construing a contract, the Court must give meaning to each of its provisions, in light of the circumstances surrounding the contract's execution, excluding statements of parties as to what they intended. *Id.*

In this case, the undisputed evidence establishes that the reinsurance contracts are signed by O.V. McDonald on behalf of Employers Casualty Company and its subsidiaries. At the time the agreements were signed, ENIC was a subsidiary of Employers Casualty Company. Both entities were located in the same building in Dallas, Texas, and shared the same telephone number. O.V. McDonald was the vice president and

secretary of ENIC with the apparent authority to bind it under these circumstances. *See General Production Co. v. Black Coral Investments*, 715 S.W.2d 121 (Tex. App.--Houston[14th Dist.] 1986, writ ref'd n.r.e.). Under the undisputed facts and circumstances of this case, the reinsurance agreements are unambiguous and bind ENIC.

In addition, if the Court conducted a trial on the issue it would be a bench trial. Crawford has failed to point any evidence which would lead the Court to find as a matter of fact that ENIC is not bound by the agreement. Conducting a bench trial would be an unnecessary waste of judicial resources and contrary to the policies of the arbitration act.

Finally, Crawford argues that the Court should order the parties to litigate their claims in the Oklahoma receivership court because that court has enjoined all parties who have dealt with ENIC from "[b]ringing, maintaining or further prosecuting any judicial or administrative proceedings against [ENIC] or the Receiver." The Court will not grant this request.

The Court's role in this litigation is limited to determining whether the parties have entered into an agreement to arbitrate. *City of Meridian v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983). The Court has made its determination and its role in this litigation has terminated. Crawford may bring the injunction to the attention of the arbitrator.

Additionally, this Court is of the opinion that the state court is the court that should interpret and enforce its injunction. If the state court determines that its injunction has been violated,

it may enter the appropriate contempt order. To rule otherwise would violate well established principles of comity and federalism and interfere with an ongoing state court proceeding. *See, generally, Parsons Steel, Inc. v. First Alabama Bank, 474 U.S.* 518, 526 (1986); *Traynor v. Hernandez,* 431 U.S. 434, 442-43 (1977); *Mitchum v. Foster,* 407 U.S. 225, 243 (1972); *Younger* v. *Harris,* 401 U.S. 37 (1971).

It is therefore **ORDERED** that the Motion for New Trial, Rehearing, or to Alter or Amend Judgment filed by Respondent John R. Crawford, on October 2, 1996, is **denied**.

Signed this 8th day of October, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX E

September 18, 1996 Order of the United States District Court for the Northern District of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE
ARBITRATION BETWEEN

MUNICH AMERICAN REINSURANCE
COMPANY AND NAC REINSURANCE
CORPORATION,
Petitioners,

v. No. 3:96-CV-2024-T

JOHN R. CRAWFORD, INSURANCE
COMMISSIONER OF THE STATE
OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,
Respondent.

ORDER GRANTING PETITION TO COMPEL
ARBITRATION
AND
DENYING RESPONDENTS' MOTION TO DISMISS

Before the Court is the Petition to Compel Arbitration filed by Munich American Reinsurance Company and NAC Reinsurance Corporation. Also before the Court is the Motion to Dismiss Petition to Compel Arbitration filed by Respondent John R. Crawford, Insurance Commission of the State of Oklahoma, As Receiver of Employers National Insurance Corporation. After considering the petition, the motion, and the record in this case, the Court is of the opinion that the petition should be granted and the motion to dismiss denied.

Petitioners filed this action to enforce arbitration provisions contained in two reinsurance contracts, which they claim are binding upon Employers National Insurance Corporation. The sole issue before the Court is whether it has the power to compel Crawford to arbitrate the underlying dispute under the Federal Arbitration Act, 9 U.S.C. § 4. The allegations in the petition demonstrate that the Court has independent jurisdiction over this matter based upon complete diversity of citizenship. 28 U.S.C. § 1332.

Crawford denies that Employers National is a party to the agreements, and requests an evidentiary hearing on the issue.[1] Crawford contends that the agreement is ambiguous because they purport to bind only Employers Casualty Company and its subsidiaries that are located in Dallas, Texas. Crawford

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[1] Assuming for purposes of this motion that Crawford has a right to a jury trial on this issue, he has waived this right by failing to make such a request in either his answer or his motion to dismiss. *See* 9 U.S.C. § 4; *Hamilton Life Ins. Co of New York v. Republic Nat. Life Ins. Co.*, 408 F.2d 606 (2nd Cir. 1969).

contends that Employers National is not located in Dallas. Crawford also contends that the signatory of the agreements was not empowered to bind Employers National.

The policy driving the Arbitration Act demands rigorous enforcement of agreements to arbitrate. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). However, the Court must first determine whether the parties agreed to arbitrate the dispute. *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1984). Whenever the scope of an arbitration clause is in question, the Court construes the clause in favor of arbitration. *United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *City of Meridian, Miss., v. Algernon Blair, Inc.*, 721 F.2d 525, 527 (5th Cir. 1983). The Court may not look to or decide the merits of the underlying claim, *Id.*, and the restricted nature of the inquiry reflects the congressional policy that parties to an arbitrable dispute move quickly out of court and into arbitration. *See Moses H. Cone Hospital v. Mercury Contr. Corp.*, 460 U.S. 1, 23 (1982).

In this case, Petitioners contend that Crawford is bound by the arbitration clauses contained in Umbrella Liability Reinsurance Agreement CAF 4139 between Munich American and Employers Casualty Company (including subsidiaries), and Umbrella Liability Reinsurance Agreement between North American Company for Property and Casualty Insurance and Employers Casualty Company (including subsidiaries). The agreements are signed by O.V. McDonald on behalf of Employers Casualty Company and its subsidiaries. Petitioners provide uncontroverted evidence that O.V. McDonald was Vice President and Secretary of both Employers Casualty Company

and its subsidiary, Employers National. Petitioners also provide evidence that Employers National was located in Dallas at the time the agreements were signed.

The Court determines that the evidence of record establishes as a matter of law that Employers National signed and is bound by the terms and provisions of the underlying reinsurance contracts. The contract unambiguously states that Employers Casualty Company (and its subsidiaries) are parties to the agreements, and there is no genuine dispute that O.V. McDonald had the power to bind Employers National. The objective intent of the parties is demonstrated by the terms and provisions of the agreement.

Crawford urges the Court to consider extrinsic evidence regarding the subjective intent of the parties. Even were the Court to find that the contract is ambiguous and that it should consider extrinsic evidence, it would find as a matter of fact that Employers National is bound by the terms of the agreement.[2] A review of the extrinsic evidence of record indicates that the subjective intent of the parties was to bind Employers Casualty Company and all of its subsidiaries.

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[2] Because there are no issues of witness credibility, the Court is not required to conduct an evidentiary hearing to determine limited factual questions. *See Matter of Placid Oil Co.*, 832 F.2d 394, 397-398 (5th Cir. 1991) (Where the decision is to be reached by the Court, and there are no issues of witness credibility, the Court may decide limited factual issues on summary judgment).

For example, the Affidavit of H. Wayne Dortch, President and Chief Executive Officer of Employers General Insurance Group, Inc., who participated in the negotiation of the agreements, indicates that the parties intended to bind all of the subsidiaries. Although Crawford provides some evidence that the Oklahoma Insurance Department expressed "concerns" that the subsidiaries should actually be named in the contract, this evidence does not directly contradict the affidavit of Dortch. In any event, the Court determines that the contract is unambiguous regardless of the Oklahoma Insurance Department.

It is therefore **ORDERED** that the Petition to Compel Arbitration filed by Munich American Reinsurance Company and NAC Reinsurance Corporation, on July 18, 1996, is **granted.** The parties are directed to commence arbitration proceedings consistent with the terms and provisions of the underlying reinsurance agreements.

It is **FURTHER ORDERED** that the agreed preliminary injunction previously entered by this Court shall remain in effect subject to modification or dissolution of the arbitrator.

It is **FURTHER ORDERED** that the Motion to Dismiss Petition to Compel Arbitration filed by Respondent John R. Crawford, Insurance Commission of the State of Oklahoma, As Receiver Employers National Insurance Corporation, on August 19, 1996, is **denied.**

It is **FURTHER ORDERED** that this action is **administratively closed.** The Court will not reopen the case

except upon properly filed motion to confirm the arbitration award of the arbitrator.

Signed this 17th day of September, 1996.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

APPENDIX F

The Constitution of the United States

Article III

Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;-- to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX G

The Federal Arbitration Act, 9 U.S.C. Section 1 et. seq.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such

application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

APPENDIX H

The McCarran-Ferguson Act, 15 U.S.C. Section 1011 et seq.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1980, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX I

Diversity Jurisdiction
28 U.S.C. Section 1332

§ 1332. Diversity of Citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

* * * *

APPENDIX J

Oklahoma Uniform Insurers Liquidation Act
36 Okla. Stat. Section 1901 et seq.

§ 1901. Definitions

For the purpose of this article:

* * * *

3. "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this article for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

* * * *

§ 1902. Delinquency proceedings; jurisdiction; venue; nature of remedy; appeal

A. The district court is vested with exclusive original jurisdiction of delinquency proceedings pursuant to the provisions of this article, and is authorized to make all necessary and proper orders to carry out the purposes of this article.

B. The venue of delinquency proceedings against any insurer shall be in Oklahoma County.

C. Delinquency proceedings pursuant to this article shall

constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer. No person other than the Insurance Commissioner, his attorney, or the Attorney General representing the Insurance Commissioner shall appear in the courts of this state requesting the appointment of a receiver or otherwise commence delinquency proceedings to take over, liquidate, rehabilitate, reorganize, or conserve an insurer and no court shall entertain a petition for the commencement of such proceedings unless the same has been filed in the name of the state on the relation of the Insurance Commissioner.

D. An appeal shall lie to the Supreme Court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every other order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein.

§ 1903. Commencement of delinquency proceedings

The Insurance Commissioner shall commence any such proceeding, his attorney or the Attorney General representing him, by an application to the court for an order directing the insurer to show cause why the Insurance Commissioner should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of policyholders, creditors, stockholders, members, subscribers, or the public may require.

§ 1904. Injunctions

A. Upon application by the Insurance Commissioner for such an order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents and all other persons for the transaction of its business or the waste or disposition of its property until the further order of the court.

B. The court may at any time during a proceeding under this article issue such other injunctions or orders as may be deemed necessary to prevent interference with the Insurance Commissioner or the proceedings, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

C. Notwithstanding any other provision of law, no bond shall be required of the Insurance Commissioner as a prerequisite for the issuance of any injunction or restraining order pursuant to this section.